

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1369

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
JOSEPH J. GAY,
Defendant-Appellant.

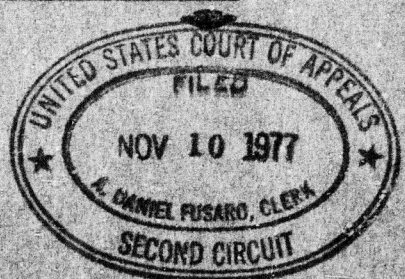
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLEE

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IN THE
United States Court of Appeals

For the Second Circuit

Docket No. 77-1369

UNITED STATES OF AMERICA,

Appellee,

vs.

JOSEPH J. GAY,

Defendant-Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

On the 4th day of April, 1974, a Federal Grand Jury in the Western District of New York returned a five-count indictment against Joseph J. Gay, charging him with income tax evasion, in violation of Title 26, U.S.C., Section 7201.

More specifically, the five counts charged Joseph Gay with wilfully, knowingly attempting to evade and defeat a large part of the income tax due to the U. S. by filing a false and fraudulent income tax return for the years 1967, 1968, 1969, 1970 and 1971. The trial of this action commenced on March 22, 1976 and on April 13, 1976 the jury returned a verdict of guilty on each count in the Indictment.

Thereafter, defendant's trial counsel, Robert Murphy, made motion on April 20, 1976 that the Court set aside the verdict of guilty or in the alternative for a new trial. In order

to allow the defendant in this case to fully and completely make said motion, the Court allowed the defense an opportunity to order the full transcript of the trial which was completed on or about June 5, 1976. Thereafter, the defendant changed counsel to R. William Stephens who is now representing him on this appeal. He submitted a 53 page memorandum on September 3, 1976 in support of the motion. On September 3, 1976, the government submitted a response memorandum of 48 pages.

On the date scheduled for oral argument of that motion, October 5, 1976, the Judge requested additional memorandums from both the defendant and the government. Pursuant to that request, the defendant, on December 16, 1976 filed an additional memorandum of 21 pages and the government responded with a supplemental memorandum in opposition of 59 pages. In a 15 page Decision and Order dated June 13, 1977 the defendant's motion for setting aside the verdict of guilty or in the alternative for a new trial was denied.

It should be noted that the issues raised in this appeal are substantially the same as were considered by the Court in the motion to set aside the verdict of guilty.

On July 21, 1977, the defendant was sentenced to 3 years probation and \$5,000 on Count I and \$7,500 on each of the remaining four counts.

It is from that conviction and the sentence imposed by the Court which the defendant now appeals.

Statement of Case

The Appellant in setting forth the facts gives only a partial version of those facts and then in the light most favorable to the defendant.

This is an income tax evasion case which was complicated as to the evidence presented and as to the legal theory involved in proving the case *i.e.* the expenditures method of proof.

Accordingly in order to fully state the case to this Court, Appellee will structure it so as to demonstrate the evidence, then a legal treatise of the expenditure method of proof and an application of that method to the evidence be presented. Finally the points raised by the appellant will be treated to the extent not already disposed of in this subdivision.

Statement of Evidence

On December 28, 1971, Special Agent Kenneth A. Kryzstof of the Internal Revenue Service contacted the defendant, Joseph J. Gay, pursuant to a criminal investigation of Mr. Gay to which Kryzstof was assigned (Tr. P. 55).¹ At Mr. Gay's residence, he informed the defendant that he was conducting a criminal investigation of him (Tr. P. 56). During the course of that interview, Mr. Gay told the Special Agent the following: That he maintained two brokerage accounts, one with Loeb, Rhodes and Co. and the other with Shields & Co.; he had savings accounts with the Buffalo Savings Bank, Erie Federal Savings and Loan Association and Marine Midland Bank; his wife had a bank bond with the Erie County Savings Bank; he had given mortgage loans to various people and that he did not have any investments in municipal bonds; he further revealed that he nor his wife have a personal checking account; however, he does maintain a business checking account under the name of Gay's Printing, the name of his

¹ Refers to transcript pages and also pages of Defendant-Appellant's Appendix which reproduces the entire transcript.

business, at Marine Midland Bank (Tr. P. 59). *He further stated that he had a safe deposit box at Marine Midland, but he only kept miscellaneous papers and does not keep any cash in that box; he does not maintain any trust accounts in the name of anyone else; he does not have any loans outstanding nor does he have any other debts; he owns his house free and clear (Tr. P. 60).*

He was asked at that time whether he had any non-income items such as insurance proceeds, inheritances, gifts, or accident awards to which the defendant replied that he had received approximately \$5,000 to \$6,000 as an inheritance from his parents which would have been in approximately 1968 or 1969. He also said that his wife received approximately \$1,800.00 in accident proceeds in either 1968 or 1969. Other than that he stated that he did not receive any other non-income items and that he had never given any gifts to anyone (Tr. P. 60).

During the course of this interview, Special Agent Kryzstof also had occasion to ask the defendant as to what was the most cash on hand he would have at any one time. The defendant said it would be difficult to estimate how much cash he had on hand at any one point in time. This was due to such variables as mortgage receivables he might have received payments on, stock dividends he may have received, payments from his printing business and withdrawals he may have made from his bank accounts. (Tr. Pp. 68 and 69).

On June 8, 1972, Special Agent Kryzstof met with Mr. Gay, at which time Special Agent Kryzstof again talked to Mr. Gay regarding cash on hand. At that time, *he explained to Mr. Gay that what he meant by cash on hand was any monies that were undeposited such as money he might have in his pocket, in his wallet, in his bureau drawer, in a cigar box, anything of this*

nature, including checks that were not yet negotiated. The defendant replied that the most he could ever have at any one point in time would have been \$2,000.00 (Tr. Pp. 67, 68).

On February 21, 1973, Special Agent John Quinn of the Internal Revenue Service who had taken over the investigations conducted an interview with Mr. Gay. At that time, Mr. Gay informed Special Agent Quinn that during the year 1967 through 1971 he had purchased a new car from Hank Bokman Oldsmobile and sold the old car to a friend for "a couple hundred dollars." (Tr. P. 298). At that point, Special Agent Quinn asked the defendant about inheritances which he and his wife have had, to which the defendant responded that he had inherited approximately \$6,000.00 when his father had died and that his wife did not have any inheritances during the prosecution period (Tr. p. 299). The defendant further stated at that time that *he had made no personal loans to members of his immediate family, and the only loans he had made to friends were the mortgages outstanding to various people.* The defendant at that time turned over the broker's statements regarding investments which he had in securities (Tr. p. 300). Also, it was established that the defendant had investments in two mutual funds, the Anchor Growth Fund and the Dreyfuss Fund. The defendant stated at that time that he made the investment in the Anchor Growth Fund for \$1,000.00 in the early 1960's and that he never received any of the dividends, but rather reinvests the dividends back into the fund. He never received cash on the dividends from this fund. He also said the Dreyfuss Fund was acquired in the early 1960's and prepaid in the amount of \$10,000.00. The dividends on that fund were also reinvested back into the fund rather than being received on a year-to-year basis (Tr. p. 301). Mr. Gay further stated that all the stock transactions were handled through Loeb, Rhodes (formerly Hugh Johnson) and Shields

& Co. (Tr. p. 302) and that all stock transactions would be reflected through those accounts. After he purchased a stock, he would have that delivered to him personally, in his own name. The defendant further stated *that most of the mortgage loans he made were made primarily through bank drafts from the Buffalo Savings Bank* (Tr. p. 305). Mr. Gay had also stated at that time that he had a robbery loss in 1969 (Tr. p. 306) and that he purchased a vacant lot in West Seneca for which he paid \$3,000 in 1971 (Tr. p. 307).

At a meeting held on May 8, 1973, Special Agent Quinn asked Mr. Gay about the purchase of a Treasury note. Mr. Gay stated that after the robbery which occurred on December 17, 1969 his wife had informed him that she had kept a substantial amount in a mattress and because of the burglary, Mr. Gay stated that he felt he didn't want to keep this kind of money around the house. He, therefore, took all or part of the money to a Federal Reserve Bank and purchased a \$10,000 U.S. Treasury note. Mr. Gay said that the money she kept in the mattress would not have been more than \$11,000.00 (Tr. p. 304). In 1971 when he redeemed this note, he purchased an Erie County Savings Bank bond (Tr. p. 305).

Mr. Gay stated that he held an \$80,000.00 Federal Intermediate Credit Bank bond and held all of his municipal bonds throughout the years 1970 and 1971 (Tr. p. 316). Special Agent Quinn also learned from the defendant *what mortgages he had outstanding during the years 1967 thru 1971 and what the amount of the paybacks were during those years* (Tr. p. 319).

Other than interviewing the defendant, Special Agent Quinn made an independent investigation to verify his computations. He also verified taxable and non-taxable income based on the leads Mr. Gay had furnished him, especially as to non-taxable sources.

He contacted Mr. Messina who is an attorney regarding a claim Mr. Gay had made about his wife receiving settlement on an accident (Tr. p. 320).

Agent Quinn verified an insurance reimbursement of \$1,394.00 which Mr. Gay had received due to the 1969 robbery (Tr. p. 321). As to the inheritances which Mr. Gay said he received from his father and brother's estates, Agent Quinn verified this by contacting Leonard Gaj, the defendant's brother, who handled the estate (Tr. p. 321).

Mr. Quinn also attempted to verify whether there was any stock sold other than that reported on the defendant's tax returns for the period. This was done by contacting the transfer agents of the known security holdings of Mr. Gay. He determined that there was no stock sold by the defendant during the period other than that reported by Mr. Gay on his tax returns (Tr. p. 323).

Special Agent Quinn determined that there were no other bank accounts other than those revealed by the defendant by contacting area banks (Tr. p. 323) not just the ones the defendant mentioned but all area banks (Tr. pp. 359-360).

He verified that there were no loans or mortgages outstanding by Mr. Gay by contacting area banks and checking to see whether any other mortgages were recorded at the Erie County Clerk's office (Tr. p. 323).

In this manner, Special Agent Quinn made a determination whether any assets held prior to 1967 had been converted by him through the years 1967 through 1971. He determined that other than the stock which was reported as sold by Mr. Gay on his tax returns, there was no conversion of any of the assets owned by the defendant on December 31, 1966 during the prosecution years (Tr. p. 367).

Special Agent Quinn contacted the Social Security Administration to find out what Mr. Gay's prior earnings were. He found out that from 1945 until 1966 his earnings reported to the Social Security Administration were approximately \$63,000 (Tr. p. 358). He also talked to all the security brokers in the area to determine whether Mr. Gay had any transactions and not just the ones which the defendant stated that he had done business with (Tr. p. 360). Special Agent Quinn also made the determination as to what mortgages were discharged during the period and found there were none other than those the defendant told him about (Tr. pp. 361 and 362).

Also in addition to the testimony of Agents Kryzstof and Quinn, the Government called numerous representatives of financial institutions and other individuals with which the defendant had transacted business to introduce business records as they pertain to Mr. Gay.

Through these witnesses, over 140 government exhibits were moved into evidence pertaining to various financial transactions of the defendant.

As its last witness, the Government called Revenue Agent Joseph Russo to the stand as an expert witness who had analyzed testimony and documents moved into evidence at this point and according to his analysis as reflected in Government's Exhibit 159, he came up with the following expenditures of funds in excess of sources for each of the taxable years.

1967	1968	1969	1970	1971
<i>Total Expenditures of Funds</i>				
\$ 43,998.54	\$ 39,986.60	\$ 82,855.50	\$ 217,560.27	\$ 93,228.32
<i>Total Sources of Funds¹</i>				
<u>\$ 27,500.73</u>	<u>\$ 21,415.14</u>	<u>\$ 32,567.51</u>	<u>\$ 171,399.07</u>	<u>\$ 57,715.95</u>
<i>Expenditures in Excess of Funds</i>				
<u>\$ 16,497.81</u>	<u>\$ 18,571.46</u>	<u>\$ 50,287.99</u>	<u>\$ 46,161.20</u>	<u>\$ 35,512.37</u>
<i>Additional Tax or Expenditures in Excess of Funds</i> (Over and Above Tax Shown on Returns)				
<u>\$ 5,204.75</u>	<u>\$ 6,306.36</u>	<u>\$ 23,750.26</u>	<u>\$ 20,812.55</u>	<u>\$ 15,362.20</u>

Mr. Russo arrived at the above conclusions of expenditures in excess of funds and the additional tax due and owing by performing an analysis of the evidence both testimonial and documentary. That analysis is embodied in work sheets prepared by him and in evidence. (Government Exhibits 140 thru 149, 158, 159 and 160).

Various components which went to makeup the showing of expenditures in excess of funds and the analysis of them is as follows.

Cash in Banks and on Hand

Mr. Russo analyzed cash in banks and cash which the defendant purportedly had on hand in the amount of \$13,000.00² (which is treated under a separate heading, *infra*),

¹ This includes income shown on the return as well as non-taxable sources.

² This is the total of the \$2,000 the defendant told Special Agent Kryzstof about as the most he would ever have on hand, and the \$11,000 which the defendant told Special Agent Quinn about as belonging to his wife. At this point in the trial there was still no hint of a "cash hoard" defense.

and made the following calculations on Government Exhibit No. 141. He determined that the defendant on December 31, 1966, the day immediately preceding the first indictment year, had total cash accumulated in the amount of \$117,348.28. As of December 31, 1967, this increased to \$147,865.77; as of December 31, 1968, this increased to \$165,087.76; as of December 31, 1969, this again increased to \$179,390.29; as of December 31, 1970, this *decreased* to \$41,178.87; and as of December 31, 1971, this cash increased over the preceding year to \$95,772.53. Mr. Russo then determined the respective increases (or decrease) in the defendant's cash over the previous year by deducting out the previous year's balance. In effect as to the defendant's cash he performed a typical net worth calculation. For the years 1967, 1968, 1969 and 1971 which reflected increases over the previous years balance, this was attributable to the defendant as an expenditure of funds. For the year 1970 in which the defendant's cash decreased, this was allowed to the defendant by Mr. Russo's calculations as a non-taxable source of funds which reduced unexplained expenditures accordingly.

Corporate Stock

On December 31, 1966, the defendant held over 4,300 shares of corporate stock in 14 corporations, having a cost basis of \$84,579.97.³ It should be noted that the Government

³ *Stock Owned on December 31, 1966*

<i>Gov.</i>		
<i>Ex. No.</i>	<i>Security</i>	<i>Cost Basis</i>
4	200 shs.—Bell & Howell	\$ 4,142.38
6	100 shs.—Allied Arrow Indust.	775.00
113	943 shs.—Anchor Growth Fund	9,643.36
123	200 shs.—Niagara Mohawk	4,294.68
123	100 shs.—U.S. Steel	4,039.50

(Footnote continued on following page)

exhibits in that schedule establish that the stocks listed therein were purchased prior to January 1, 1967. The fact that these securities were still held by the defendant on December 31, 1966 was established and is evidenced by the respective stock brokers and stock transfer agents who testified regarding Mr. Gay's holdings. Furthermore, Revenue Agent Joseph Russo had verified the defendant's stock holdings by comparing his known holdings with the dividends reported by the defendant as shown on his 1966 tax return. Mr. Russo also traced the dividends received as claimed by Mr. Gay on his tax returns on a year-to-year basis. If the defendant was still reporting dividends on his returns, Mr. Russo would assume that that security had not been sold. According to this method of verification, Mr. Russo concluded that other than the stock shown as sold on the 1967 thru 1971 tax returns, there were no other securities sold by the defendant (Tr. p. 525).

Also the fact these securities were held throughout the indictment years was verified by Special Agent Quinn by contacting the stock transfer agents of stocks held by Mr. Gay as previously noted. He found that none of these securities were

(Footnote continued from preceding page)

<i>Gov. Ex. No.</i>	<i>Security</i>	<i>Cost Basis</i>
124	100 shs.—Niagara Mohawk	2,305.25
125	100 shs.—A T & T	5,182.14
125	200 shs.—Niagara Mohawk	4,281.76
127	600 shs.—Amer. Metal Prod.	12,878.52
128	100 shs.—General Motors	8,072.53
130	100 shs.—Dresser Industries	2,669.69
131	100 shs.—Sante Fe Industries	2,971.19
132	200 shs.—Crucible Steel	4,811.50
134	100 shs.—Bethlehem Steel	3,637.00
136	100 shs.—Chicago Pneumatic Tool	3,209.88
137	1,125 1/2 shs.—Drefus Fund	<u>11,665.59</u>
		<u>\$84,579.97</u>

sold except for the ones which were reported by the defendant on his tax returns (Tr. p. 323).

As to the pre-1967 security holdings which were sold during the indictment years, the gain was properly reported on the defendant's tax returns and the gain from the sale of securities was, therefore, allowed defendant as a source of funds from which his expenditures were made.

As to the return of capital or return of the defendant's cost when these securities were sold, this was determined by Mr. Russo and allowed the defendant as a non-taxable source of funds in the year in which the security had been sold.

Therefore, all securities held prior to the indictment years were either accounted for through the indictment years as being continued to be held by the defendant or as being sold. To the extent these securities were sold, they were properly allowed to the defendant as a diminution of prior years' assets and allowed to the defendant as a non-taxable source of funds.

As to stocks purchased during the indictment period, Government Exhibit 146, these were treated as an expenditure of funds and none of these securities were sold during the prosecution years.

Mortgage Receivable

At the trial, there was evidence that the defendant had made numerous mortgage loans to various individuals and

that on December 31, 1966, the balance of the principal owed to him on these mortgages was \$30,793.23.⁴

During the indictment years, 1967 through 1971, the defendant received principal repayments along with interest on the mortgage loans he had made. Mr. Russo in making his calculations made an analysis as to what amounts of principal were paid back for each of the years, 1967, 1968, 1969, 1970 and 1971. To the extent the defendant received a principal payback on those mortgages in any given year, it was allowed to the defendant as a non-taxable source of funds which reduced his excess of expenditures accordingly. See Government Exhibit No. 142.

Along with the principal on these mortgages, the defendant also received interest payments. To the extent these were shown on the defendant's tax returns, they were allowed as a source of funds to the defendant. Also, there were various interest payments received which the defendant did not reflect on his tax returns. Even though these interest payments were taxable and were not reported by the defendant, the Government still allowed these as a *non-taxable* source of funds because the defendant had told the agents that he had forgotten to include these in his tax returns. Since this statement by the defendant negated wilfulness, these taxable interest

⁴ *Mortgages Receivable on December 31, 1966*

Bicyna Mortgage	\$ 6,840.00	Gov. Ex. 75
Karzmarek Mortgage	5,507.46	Gov. Ex. 76
Mazur Mortgage	7,000.00	Gov. Ex. 78
Tokarczyk Mortgage	3,500.00	Gov. Ex. 80
Tokarczyk Mortgage	4,100.00	Gov. Ex. 81
Wisniewski Mortgage	845.76	Gov. Ex. 82
Wyszalek Mortgage	3,000.00	Tr. p. 318
	<u>\$30,793.23</u>	

payments were allowed the defendant as a non-taxable source of income to reduce the excess of expenditures and do not constitute part of the excess of expenditures which the government claims is unreported taxable income. See Government Exhibits 143 and 159.

U.S. Savings Bonds

It was also established thru stipulation, Government Exhibit 16-1, that the defendant at December 31, 1966 owned \$13,000 worth of U.S. savings bond. Government Exhibit 16-1 further goes to establish that none of these savings bonds were redeemed by the defendant during the indictment years.

It is important to note that the Government's analysis of the defendant's cash in banks, *mortgage payments received* and stock and bond transactions were never challenged by the defense. There was never any claim that there were conversions of any of these assets during the indictment years which the Government missed which could have accounted for the expenditure of funds. The whole issue was as to the defendant's "cash hoard" which is treated *infra*.

Therefore, the Government appropriately identified these assets held by the defendant prior to the prosecution years and thoroughly identified to what extent diminution of prior years assets contributed to expenditures as a non-taxable source of funds.

Opening Net Worth

According to the above, there was enough evidence introduced at the trial to establish the defendant's opening net worth as of December 31, 1966 as follows.

Cash on Hand and in Banks	\$117,348.28
Securities	84,579.97
Mortgages	30,793.22
U.S. Bonds	<u>13,000.00</u>
	<u>\$245,671.47</u>

It should be noted that there were a few assets owned by the defendant which were not included in the above opening net worth. That is, the car and the defendant's house which he owned at the beginning of the period. As to the house, it was established at the trial that the home was owned free and clear by the defendant prior to the prosecution years and that defendant continued to own that same home throughout that period. As to the car, the defendant had told Special Agent Quinn that he had sold it for \$200 in 1969 and that was allowed to the defendant as a non-taxable source of funds in that year.

Although there was no witness during the course of the trial which testified that the defendant had an opening net worth of \$245,671.47, it was brought to the jury's attention during the Government's summation that immediately preceding the prosecution years, on December 31, 1966, the defendant had over \$225,000 tied up in investments.

Investigation of Leads Furnished by the Defendant Regarding Non- taxable Sources of Income

In interviews by the special agents, the defendant had stated that he had received income from non-taxable sources during the prosecution years as noted in the testimony of the agents above. That is the money he received from the in-

insurance company after the robbery in 1969, the funds distributed from the estates of his father and his two brothers and proceeds received from an insurance settlement from an accident which his wife had. These were all investigated by the agents and where appropriate, were allowed, as a non-taxable source of funds to the defendant in the years he received these funds.

The insurance recovery resulting from the robbery in 1969 was received by the defendant in 1970 and allowed as a non-taxable source to the defendant in that year in the amount of \$1,394.00. See Government Exhibit 159. The source for attributing this recovery for that year are Government Exhibits 6 and 34-1.

As to the distributions received by the defendant resulting from the death of his father and two brothers, the Government called the executor of those estates, Mr. Leonard Gaj, the defendant's brother. He testified that from his brother Joseph's estate, the defendant received \$1,046.68 in 1969 (Tr. p. 366) and a distribution made to the defendant from his brother Edward's estate also in 1969 was \$380.34 (Tr. p. 367). As a result of the defendant's father's estate, the defendant received a distribution in 1971 of \$1,528.68 (Tr. p. 368). These distributions from the various estates were allowed to the defendant in the appropriate years as a non-taxable source of funds as is reflected in Government Exhibit 159.

The defendant had also told the agents that his wife had had an automobile accident and that she received a settlement from this. This was also investigated. Regarding this settlement, the Government called Crusian Messina and he testified that he was the attorney who had handled that accident case on behalf of Mrs. Gay. That he had received a settlement of \$1,200.00; however, the proceeds of that set-

tlement were turned over to Mrs. Gay in 1965 and accordingly since these proceeds were received by her prior to the indictment years, this was not treated as a non-taxable source of funds during the indictment years.

It was stipulated to that the defendant purchased a new Oldsmobile in 1969 for cash (Government Exhibit 16-2) and the defendant had told Special Agent Quinn that at that time he had sold his old car to a friend for a couple hundred dollars. Accordingly, in 1969 \$200.00 was allowed to the defendant as a non-taxable source of funds from the sale of his old automobile.

Cash on Hand

The defendant during the course of the interviews with the Special Agents of the Internal Revenue Service was asked about cash on hand, including money in safe deposit boxes and money he might have around the house. As noted earlier in the "Statement of Facts", he told Special Agent Kryzstof that he would never have more than \$2,000.00 in cash laying around the house. However, he subsequently told Special Agent John Quinn that his wife had been saving money which he found out about in 1970. The money she saved was not more than \$11,000.00 of which he spent \$10,000.00 in 1970 because he did not want it laying around after the robbery. Accordingly, since it was not known when this money was accumulated, \$13,000.00 was allowed by Special Agent Russo in his calculations as being an asset held prior to 1967, the first indictment year. When the defendant spent \$10,000.00 of it in 1970, it was allowed to the defendant as a non-taxable source of funds.

Defendant's Case

After the Government rested its case, the defense then proceeded to put in a "cash hoard" defense. The defense was that the defendant kept a tin box in the basement of his house in which he had accumulated over \$100,000.00 prior to the indictment years and which accounted for the expenditures during those years. Although the defense called numerous witnesses, the cash hoard was established primarily by the testimony of two witnesses, Silvio Russo, the defendant's son-in-law, and the defendant himself.

Silvio Russo testified that after the defendant was robbed in 1969, the defendant told him that they did not get the big money and *took him down to the basement* where the defendant showed him a tin box containing \$110,000.00 (Tr. p. 651). He also testified that in 1970, the defendant took a trip to Spain and he gave Russo the custody of this box to hold for him while he was on vacation. At this point in time, the amount of money in that box was reduced to approximately \$40,000.00 (Tr. p. 652).

The defendant took the stand and testified that he was in the tavern business in the early 40's and after two years sold that business at which point he had \$65,000.00 "cash on hand" (Tr. pp. 680 thru 682). That he was skeptical about banks because of the failure in the 30's and, therefore, kept this money in the form of cash (Tr. p. 683). After the robbery in 1969, he decided to no longer keep the money around and started to make large investments (Tr. pp. 686-688).

This defense was somewhat corroborated by the testimony of the defendant's two daughters, Dorothy Hobart and Lorraine Russo. They testified that on occasion when their parents went away on vacation, their father would tell them

that if anything happened to him that they should look around the house because there was money and other papers around. That their father stated that they should look in the *crawl space in the attic* (Tr. pp. 615 and 628). However, neither daughter testified as to ever having seen the tin box which this money was supposedly kept in and neither daughter could testify as to the amount of money their father was alluding to. As far as they know, their father could have been talking \$1,000.00 or \$100,000.00.

The cash hoard was also somewhat corroborated by the testimony of the defendant's brother, Leonard Gaj. He testified that in 1958 his brother loaned him some money and at that time his brother took it out of a tin box. Although he did not personally count the money, due to his experience at the bank he had seen large sums of money, and he could, therefore, estimate that at that time there was approximately \$100,000.00 in that box (Tr. pp. 371 and 372). He also indicated that the tin box he had seen was kept in the basement (377).

Expenditures Theory

The expenditures method of proof simply stated is that the defendant's expenditures are established for a taxable period and from that amount is deducted out the sum of the amount of taxable income declared by the defendant on his tax return for that period *plus* any non-taxable source of funds which could have accounted for the expenditures. Included as non-taxable funds are gifts, inheritances, insurance proceeds received, etc. and assets held prior to the period in question which were converted during the period and spent. The result is that the inference can be drawn from this calculation that any excessive expenditures over amounts reported on the

defendant's tax return for a given year plus amounts of non-taxable sources including diminution of prior years assets is attributable to undeclared taxable income for the period.

The landmark case of the expenditures theory is *Taglianetti vs. United States*, 398 F.2d 558 (1st Cir. 1968), which establishes the Government's burden of proof in an expenditures case.

Under *Taglianetti*, the cash-expenditure theory is a variant of the net-worth method of establishing unreported taxable income, both being an indirect method of proof. However, the net-worth theory is distinguished from the expenditures theory therein in that the net-worth method involves the ascertaining of a taxpayer's net worth positions at the beginning and end of a tax period and that part of any increase in net worth not attributable to reported income or non-taxable sources is unreported taxable income (Page 562).

The cash expenditures method on the other hand establishes as unreported taxable income the amount of expenditures which are not attributable to the resources at hand at the beginning of the year or to non-taxable sources received during the year or to amounts reported as income on the current year's tax return. In the expenditures method of proof, the beginning and ending net worth positions of the defendant must be identified with sufficient particularity to rule out or account for the use of a defendant's prior accumulated capital for any of his expenditures. To the extent the defendant's prior resources show a diminution, the decrease reduces *pro tanto* the extent to which such expenditures reflect unreported taxable income (pages 562 through 563). The First Circuit in *Taglianetti* at page 565 went on to set forth what the Government's burden of proof was regarding an opening net worth in an expenditure's case as follows.

"In a typical net worth case, as *Holland* (*Holland vs. United States*, 348 U.S. 121 (1954)), precise figures would have to be attached to opening and closing the net worth positions for each of the taxable years to provide a basis for the critical subtraction. In a cash expenditures case, reasonable certainty may be established without such a presentation as long as the proof . . . makes clear the extent of any contribution which beginning resources or diminution of resources over time could have made to expenditures."

This has been adopted in the Second Circuit by *United States vs. Fisher*, 518 F.2d 836 (2nd Cir. 1975) and *United States vs. Bianco*, 534 F.2d 501 (2nd Cir. 1976).

Taglianetti further went on to state on page 565 that the jury need not be apprised of the dollar value of each of the defendant's assets comprising opening net worth as long as proof is sufficient to allow the jury to determine whether any expenditure found to be in excess of reported income could be accounted for by any assets available at the outset of the prosecution period or non-taxable receipts during that period. As long as this is done a running series of net worth statements are unnecessary.

The Government, therefore, does not have to come up with a definite net worth figure for the beginning or end of any specific taxable year but has to specifically identify what assets were held at the beginning of the periods and trace such assets to see whether or not such assets were converted during a given taxable year. To the extent those assets were converted, they are to be allowed to the defendant as a non-taxable source of expenditures.

This is precisely what the Government did in this case. The defendant's cash in banks and investments in stocks, bonds,

mortgages and real estate were all determined with specificity as of December 31, 1966, prior to the prosecution period. These assets were then specifically traced through the prosecution years to determine whether any of them were converted and to the extent that they were, they were allowed to the defendant as a non-taxable source of funds.

This was also the purpose of the agents inquiring of the defendant as to his cash on hand to determine the extent "cash on hand" prior to the prosecution period could have accounted for expenditures during that period. This is explored more fully *infra*.

In *United States vs. Penosi*, 452 F.2d 217 (5th Cir. 1971), *cert. denied*, 405 U.S. 1065 (1972). It is stated at page 219 that "Requiring the Government to show an opening net worth is simply a requirement that the Government prove to a reasonable certainty that the income expended did not spring from prior accumulations or earnings from which the defendant would not be liable in taxes." As to the requirement that the Government has the burden of proving the expenditures did not come from other non-taxable sources, gifts, bequests, etc., this is actually a burden to negate these possibilities. This burden may be met by the government by producing evidence that it conducted an investigation which uncovered no sources of non-taxable income.

Penosi went on to say at Page 220 that once expenditures are established, the Government is not required to conduct an exhaustive nationwide investigation if the defendant does not supply any relevant leads as to where he got the money which he spent. The Government is, therefore, not required to negate every possible source of non-taxable income which is a matter peculiarly within the knowledge of the defendant, when the defendant does not furnish such leads. Once such

non-taxable sources are negated as above, the *Government is thus relieved of its burden of showing a likely source of taxable income* (emphasis added). This is the law in the Second Circuit under *United States vs. Schipani*, 362 F.2d 825 (2nd Cir. 1966) and *United States vs. Bianco*, *supra*.

Again the Government met this burden. As noted in the "Statement of Facts", all gifts, inheritances, accident awards and receipt of insurance proceeds which the defendant told the agents about were investigated by them. Evidence was introduced at the trial to specifically determine when such payments were received by the defendant and in what amounts. To the extent they were received by him in the prosecution years, they were allowed to the defendant as a non-taxable source of funds. Special Agent Quinn even went further by contacting all area stock brokers, banks and checking the records of the Erie County Clerk's office to determine if the defendant had any assets which the defendant had not told him about. Even though questioned about cash on hand, the defendant during the investigation never supplied the agents with any lead as to the existence of a cash hoard.

At the time the Government had rested, it had established a *prima facie* case under the expenditures in excess of funds reported out of the defendant's tax returns. Further, it had established by determining what assets the defendant owned immediately prior to the prosecution years to what extent diminution of prior years assets accounted for these expenditures as a non-taxable source. All leads as to other possible non-taxable sources received by the defendant during the prosecution years were followed up by investigation of the agents as required under *Penos* *supra*.

Cash on hand was established at the close of Government's case by admissions made by the defendant to the Special Agents that he never would have had more than \$2,000.00 cash on hand and also the story about his wife saving the \$11,000.00 which he learned of in 1970. Accordingly \$13,000.00 of cash not deposited in banks was allowed to the defendant as a prior year asset. At the point the Government rested, this was uncontroverted in that the defendant himself never furnished any leads as to a cash hoard during the investigation and there was no proof elicited up to that point in the trial to indicate that on December 31, 1966 the defendant had a cash hoard in existence.

It should be noted that during the Government's direct case, the Government called the defendant's brother, Leonard Gaj, to testify as to inheritances received by the defendant and during cross examination, he testified that in 1956 he saw in his brother's possession a tin box with an amount of money which he estimated to contain over \$100,000.00. This was a full ten years prior to the prosecution period and there was nothing to indicate the existence of the cash hoard as of December 31, 1966 in either the evidence at the trial or the intensive investigation carried out by the Special Agents. Also, the fact that on December 31, 1966 the defendant had close to a quarter of a million dollars in investments tended to negate the existence of the cash hoard.

After the Government had rested, as noted earlier, the defendant came forward and put in a cash hoard defense.

It is submitted to this court that the only issue at trial, and before this court, was whether the cash hoard did in fact exist. The Supreme Court has held that a defendant cannot be convicted on the basis of an uncorroborated admission as to cash on hand alone. *Smith vs. United States*, 348 U.S. 147

(1954) and *United States vs. Caldren*, 348 U.S. 161 (1954). In *Smith*, the Court found that evidence of low earnings immediately preceding the prosecution period as evidenced by tax returns and a defendant's large increase in visible assets during the prosecution period was sufficient corroboration. Here there was evidence through the defendant's tax returns that his gross income was in 1965 \$8,366.00 and \$10,321.00 in 1966. Further, Agent Quinn testified that he checked with the Social Security Administration and found that the defendant only earned \$63,000 between the early 1940's and 1966. During the prosecution years, Joseph Gay had unexplained expenditures in excess of \$167,000.00 which meets the criteria in *Smith*. In *Caldren*, the Court found sufficient corroboration in a visible increase in the defendant's assets during the prosecution years and the fact that even the amount of the cash hoard claimed by the defendant in that case would not have explained all of his expenditures during the prosecution period. Here, as in *Caldren*, giving Joseph J. Gay credit for his cash hoard of \$110,000.00 still does not account for \$57,000.00 of expenditures during that period.

In addition to the above, when this case was presented to the jury, the jury had the following evidence before it from which it could find that the cash hoard did not in fact exist.

First and most obvious are the statements made by the defendant himself. In two interviews, Special Agent Kryzstof specifically asked the defendant about cash on hand and even defined what he meant by cash on hand as any money which the defendant would have around the house, to which the defendant responded \$2,000.00 which was used as a basis for the Government's calculations. Also when the defendant was telling Special Agent Quinn about the \$11,000.00, his wife had accumulated, he stated that he spent this right away because

he did not want to have that money laying around the house after the 1969 robbery. According to the defendant's testimony, this was supposedly the reasons for him having made such large investment and large unexplained expenditures in 1970, *i.e.* that the robbery scared him and he didn't feel it prudent to have his hoard around the house any longer. However, when he was explaining this to Special Agent Quinn as to not wanting his wife's money around the house, he still did not mention anything about his own money. From this, the jury could infer that cash box did not exist.

Although the exact opening net worth figure was not stated in a dollar amount to the jury, it was brought to their attention that on December 31, 1966, the defendant had over \$225,000.00 invested in mortgages, bonds, stocks and bank accounts (Tr. p. 814). The jury could easily infer that any profit the defendant had from the sale of his tavern business was tied up in close to a quarter of a million dollars in investments which he had on December 31, 1966, especially since according to the Social Security Administration the defendant only earned \$63,000.00 between the early 1940's and 1966 which the jury could infer was consumed by living expenses.

Also on the defendant's tax returns for the years 1965 thru 1971 (which were in evidence as Government Exhibits 2 thru 8), only two sources of income were shown, investment income and income from the defendant's printing business. A close look at these returns will show that almost all of the defendant's income was investment income. The defendant's gross income for 1965 was over \$8,300.00; for 1966 was over \$10,300.00; for 1967 was over \$15,900.00; for 1968 was over \$15,200.00; for 1969, \$17,800.00; for 1970, over \$20,000.00 and for 1971 over \$23,000.00. *The highest amount of income*

the defendant had from his printing business was in 1969 which amounted to \$720.00, the rest being all from investments. It is inconceivable that a man who earns his living by investing would forgo the additional income he could receive on the \$100,000 he allegedly kept in the basement, especially in his income bracket. This fact was called to the jury's attention in the Government's summation (Tr. p. 815). The fact that the defendant derives his livelihood from investing and also that the defendant had close to a quarter of a million dollars invested prior to the prosecution years, a jury could easily infer that the defendant's allegations of a cash hoard was totally inconsistent with his livelihood.

The defendant in putting in his cash hoard defense also stated that one of the reasons for keeping cash was that he was afraid of banks. Yet on December 31, 1966, the defendant had over \$104,000.00 in over 14 bank accounts which was brought to the jury's attention in the Government's summation (Tr. p. 815).

Also significant is the fact that none of the defendant's contentions about having a cash hoard could be independently verified by uninterested third parties. All testimony relating to the cash hoard came either from the defendant himself or close family members. Furthermore, the jury had the luxury of observing the demeanor of the defendant's family members in deciding the cash hoard issue, which luxury this court does not have. The jury was specifically requested to examine their demeanor relative to the cash hoard in the Government's summation (797-798; 802).

Also of great significance was the fact that the defendant's tax returns for the years 1965 and 1966 (Government Exhibits 2 and 3 in evidence) which *preceded* the prosecution years. On those returns, *the defendant took as an itemized deduction for*

interest which was paid on a car loan which was called to the jury's attention in the Government's summation (Tr. p. 819). There were no interest deductions during the prosecution years. Yet in 1969 when the defendant purchased a new car during the period when it is alleged the defendant had unreported taxable income *he paid cash for it*. From the defendant borrowing money to purchase a car in the preindictment years, the jury could infer that he did not have the cash hoard as alleged. See *Barcott vs. United States*, 169 F.2d 929 (9th Cir. 1948), *cert. denied*, 336 U.S. 912 (1949) where the Court stated at page 932 that a jury is entitled to draw an inference of the non-existence of a cash hoard from the evidence that the defendant therein made purchases (furniture) on the installment plan.

The existence or the non-existence of cash on hand at the starting point is obviously a jury question. *United States vs. Ford*, 237 F.2d 57 (2nd Cir. 1956), *cert. granted*, 352 U.S. 100, judgment vacated and remanded, 355 U.S. 38. Here there was a basis for the jury to disregard the cash hoard defense and viewing this evidence in the light most favorable to the Government as the Court must in deciding this appeal, this court must find, as did the jury, that they were justified in disbelieving the existence of the cash hoard.

ARGUMENT

POINT I

The Government did not establish opening net worth with reasonable certainty.

The appellant's contention that the Government did not establish opening net worth with reasonable certainty is totally ridiculous and without merit. It is clearly established

below that the Government took into account all assets owned by the defendant at the start of the prosecution periods. The main thrust of appellant's argument here, although cleverly disguised, is still as to existence of the cash hoard. As previously demonstrated and as will further be demonstrated during this brief, there is evidence showing that the cash hoard did not exist as well as testimony to the effect that it did exist. Accordingly, this issue was properly left to the jury which decided that they did not believe the existence of the cash hoard and accordingly there was no merit on appellant's contentions here.

After reviewing the argument set forth in Point I, under subdivisions a, b, and c of the defendant's Brief, it becomes clear that these arguments are basically the same that the defendant's mortgage activity prior to the indictment years established the existence of the cash hoard and accordingly are treated under one point in the Government's response.

The defense's main contentions are as follows:

(a) That during the trial, there was evidence that in years *prior to the prosecution years*, the defendant had made cash mortgages to individuals. That at the time these mortgages were made, the Government either could not or did not trace the cash coming out of a bank account. Therefore, this was evidence of a cash hoard.

(b) Also the fact that there was testimony that a number of these mortgages were paid back prior to the prosecution years and that some of these payments were in the form of cash is deemed significant by the defense. Since the Government could not or did not trace these various payments into the bank accounts, it is alleged that this is also evidence of a cash hoard.

The defense argues under (a) that since this mortgage activity was evidence of a possible cash hoard, the Government failed to prove the extent of any contribution which beginning resources (cash hoard) could have made to the defendant's expenditures.

Point (b) goes on to argue that the Government failed to negate non-taxable sources of funds, again the cash hoard, thus failing to prove that the expenditures were attributable to currently taxable income. The defense again using the mortgage activity in years prior to the prosecution years as the spring board to the cash hoard existence.

Finally, Point (c) goes on that this cash mortgage activity of the defendant prior to the prosecution years was a "lead furnished by the taxpayer" which the Government failed to follow up on. The defense contends this *even though the defendant at no time during the investigation had told the Government that these mortgages were made out of a cash hoard or the paybacks were kept in the form of cash around the defendant's house*. The first time this "lead" to a cash hoard came out was at trial.

It becomes clear from the above that the defense's argument all boil down to one argument: The Government failed to negate the possibility that the defendant's excess expenditures were made from a cash hoard.

First of all, this line of reasoning is addressing itself to the primary question of fact which was properly left to the province of the jury. The defense at the close of the trial started to raise this exact point regarding mortgage activity with the Court. The Court properly recognized this as being a jury argument, and so instructed counsel at that time (Tr. 763). Although the cash hoard question of fact was properly

left to the jury's domain, the fallacy of the defense's arguments regarding prior years mortgage activity should be examined further.

The defense's argument is that since there was evidence of the defendant dealing in cash prior to the prosecution period, that the Government has failed to account for what happened to this cash. Therefore, this could have been a possible indication of a cash accumulating and resulting source of expenditures to the defendant for the prosecution period. Accordingly, the argument goes that the Government has failed to properly follow up a lead "provided by the defendant" and that the Government has failed to negate non-taxable sources and further to show a limit of what expenditures may have come out of assets available prior to the prosecution period. This line of reasoning would impose on the Government a burden of accounting for every nickel that the defendant spent and took in in years *prior to the prosecution period*. This has never been a requirement of the expenditures theory of proof and is not a defect in the Government's case, let alone a fatal defect.

The only burden on the Government is to negate non-taxable sources of expenditures including assets of the defendant accumulated prior to the prosecution.

This burden the Government fully met when it determined what assets were converted by the defendant during the prosecution years which were owned by him prior to the prosecution years such as sale of securities, redemption of bonds, sale of automobile, etc. This burden was also met by the Government in determining what cash the defendant had in bank accounts and what expenditures could be accounted for by withdrawals from these bank accounts. As to the possibility of these expenditures coming out of cash on hand,

this question was put to the defendant on two occasions as to what cash he had on hand along with a definition of what cash on hand included. The defendant stated it was \$2,000 maximum. The Government has met its burden.

Point (a) states that the Government failed to prove with reasonable certainty the extent of any contribution which beginning resources made to expenditures. The Government did this by finding out what money was deposited in bank accounts and what cash on hand the defendant had. When a conflict over the cash hoard arose during the course of trial, mainly in the defendant's case, it became a question of fact as to whether it existed and was properly left to the jury.

As to Point (b) that the Government failed to negate non-taxable sources of expenditures, again the question is whether or not the expenditures came out of the "cash hoard" claimed to be held by the defendant. Again properly resolved by the jury as a question of fact.

The defense's Point (c) that the Government failed to negate non-taxable sources of expenditures, again the question is whether or not the expenditures came out of the "cash hoard" claimed to be held by the defendant. Again properly resolved by the jury as a question of fact.

The defense's Point (c) that the Government failed to follow up a lead furnished by the taxpayer is unsupported by evidence. At no point did the defendant tell the Government agents that these prior mortgage loans were made out of a cash hoard or that the receipts received from mortgage paybacks went back into a cash hoard. At no time did the defendant tell the agents about a cash hoard, or even hint about it. In fact, the defendant gave the agents information to the contrary—that his maximum cash on hand would be

\$2,000. Therefore, the Government has not failed to follow up any "lead furnished by the defendant."

The burden the appellant is now trying to impose on the Government is that in spite of statements by the defendant that he did not have a cash hoard, the Government must still analyze his financial activity *prior* to the indictment years to see whether he had a cash hoard. This is clearly not the Government's burden. Once expenditures are established, the Government is not required to conduct an exhaustive nationwide investigation if the defendant does not supply any relevant leads as to where he got the money which he spent. The Government is, therefore, not required to negate every possible source of non-taxable income which is a matter peculiarly within the knowledge of the defendant, when the defendant does not furnish such leads. *United States v. Penosi, supra*; *United States v. Schipani, supra*; and *United States v. Bianco, supra*.

The defense erroneously attaches too much significance to the defendant's mortgage activity in years prior to the prosecution years.

It tries to force the conclusion that since some of these prior mortgages were made in the form of cash, and the cash could not be directly traced to a bank withdrawal, that, therefore, there is the inescapable conclusion of the existence of a cash hoard.

The defense does not take cognizance of the fact that even though these mortgages may have been made in cash prior to the indictment years, the fact that they could not be traced to a savings bank withdrawal does not mean they had to come out of a cash hoard. Such loans although in cash could have been made by withdrawing money from more than one bank

account, cashing dividend checks and converting them to cash, selling securities, cashing in pay checks, receiving payments on other mortgages or any combination of these activities. This mortgage loan activity may even be the result of undeclared taxable income in prior years which is, of course, irrelevant to the prosecution years. Therefore, the significance of cash mortgage loans being made by the defendant prior to the prosecution years does not result in the inescapable conclusion of a cash hoard.

Likewise, defense also attaches too much significance to the fact that many of the paybacks of the mortgages were in cash, and these in turn could not be traced into any specific bank account. It should be noted that based on Government's Exhibits 75 through 84 which recorded the paybacks of the mortgage loans, many of these were in odd amounts and in small amounts. None of these mortgage loans were paid back in one lump sum, but rather were amortized over periods of years, and, therefore, the amounts are not that significant.

The fact that they could not be traced directly in the bank accounts does not result in the inescapable conclusion that these went into a cash hoard. The defendant could have spent this money for cost of living, purchased other assets such as stocks, bonds, or reloaned the money out. Also, these paybacks could have been deposited along with other mortgage payments received, dividend checks received, pay checks received, or any combination of monies received so that they could not be traceable as being deposited in the bank although they actually were.

The defendant, himself, said on the stand, "I don't run to the bank every time I get a check. Sometimes I let them accumulate" (Tr. 721). It is easy to see why the payments received on the mortgages are not readily traceable into the

defendant's bank accounts everytime he would receive a payment.

Accordingly, the defense in making its argument is attaching too much significance to the prior mortgage activity. This mortgage activity does not lead to an inescapable conclusion of a cash hoard.

The defense in making the above arguments relative to the defendant's prior years mortgage activity quotes from the trial transcript in buttressing its arguments. However, some of these should be examined as to whether they actually do buttress the defendant's arguments.

On page 21 of defendant's brief, it states that the Court was aware of the failure of the Government to meet the reasonable certainty requirement of the extent to which beginning resources made to expenditures and quotes the Court as commenting on the failure of the Government's proof when it commented that the "expenditure system just seems to be a very sloppy way of proving net worth" (Tr. 758). This was quoted out of context. The Court was not commenting on the Government's proof or lack of it when stating that, but merely commenting on the expenditures theory in general and was not commenting on this theory as it had applied to the evidence before it.

The defense also asserts there is a basic flaw in the Government's reasoning in treating the paybacks of prior years mortgages. On pages 26 through 25 of defendant's memorandum, the testimony of the Government's expert, Joseph Russo, is quoted in support of this.

The defense argues that the Government erroneously assumed that all prior earnings would have either been spent for cost of living or invested or *placed into savings accounts*.

The defense's contention is that this money could go into a cash hoard. The defense then goes on to state that:

"It becomes immediately apparent that it is the position of the Government that the monies earned by the defendant in prior years and received by the defendant as disclosed in the leads furnished to the Government, from principle mortgage paybacks during the years 1956 through 1966, were accounted for because they 'would show up in the savings accounts.' It is this critical fact which demonstrates the Government failed to negate non-taxable sources for prior years by assuming that such monies as saved would show up in a savings account." (Defendant's Brief page 26-27).

However, it is the defense's reasoning which is faulty because as the proof had shown, the Government did not fail to negate cash as a non-taxable source in that it was not automatically assumed that such monies, if saved, would show up in the savings account. The defendant was asked by the Special Agents investigating him what his cash on hand was. After the defendant told them that his cash on hand would not have been more than \$2,000, the Agents then concluded that based on the defendant's representations that either the mortgage money would go into the savings account or be spent for investment or cost of living. It is on the defendant's own statements that the conclusion arises that all savings were in the form of bank accounts other than \$2,000 cash on hand.

It should also be noted that at the time of the testimony which the defense relies on to show the Government's fatal assumption the Government was still putting on its direct case. At this point in the trial, the only hint of a cash hoard was the testimony of Leonard Gay who stated that some twenty years prior to the Indictment years he had seen the cash box containing \$110,000. There was no indication, let

alone evidence, that a cash hoard existed at the beginning of the prosecution years, and was, therefore, available as a non-taxable source of funds.

Also on page 22 of defendant's brief, the defense again quotes the Court out of context to buttress this argument that the Government's assumptions were erroneous as noted above. The defense states that the Court recognized the impropriety of the Government's assumptions by quoting the Court as saying ". . . therefore, it must have been from a cash hoard because there are no withdrawals from any banks of large sums of money at or about the time the mortgage loan was made" (Tr. 765). The Court is not commenting on the Government's evidence, what the Court was doing was reiterating the argument being made by Mr. Murphy, defendant's trial counsel, to make sure that it understood correctly the argument which he was making. The Court was not adopting it as its point of view at all which can be seen from the transcript. The first phrase of that sentence is: "Again, that comes to jury argument . . ." Also, the first thing the Court said after the quoted portion was that the defense should argue that to the jury. The Court just did not adopt that as its argument. Accordingly, there is no merit to the defendant's argument under Point I and the defendant's conviction on this ground should be affirmed.

POINT II

The defendant was not convicted on an "un-corroborated" statement as to cash on hand.

The defense argues that the defendant's statement as to cash on hand not exceeding \$2,000 was not corroborated, and, therefore, his conviction cannot stand using this statement as a basis.

Again this comes down to whether or not the cash hoard existed and was the source of expenditures. Although the actual figure of \$2,000 was not in and of itself corroborated, there was evidence which corroborated that the cash hoard *did not* exist.

The inescapable conclusion which the evidence establishes is that Joseph J. Gay was an investor and an astute one at that.

On the day immediately prior to the prosecution period, the defendant held \$225,000 in investments in stocks, bonds, bank accounts, and mortgages. Hardly the type of investments one would expect of a miser hiding his cash in the basement.

As noted in the statement of the case, his income tax returns show that his investments were his primary source of income. The concept of an investor leaving money in his basement was apparently too inconsistent for the jury to believe and they chose not to believe the cash hoard.

Government exhibits 2 and 3 in evidence are the defendant's 1965 and 1966 tax return, which are pre-indictment years. Over 94 percent of the defendant's adjusted gross income shown on the returns is investment income. Income earned by the defendant putting money to work for him.

Further, the 1965 and 1966 returns show the defendant as having adjusted gross income in those years of \$8,366 and \$10,321 respectively. The man could have increased his income by over 30 percent merely by depositing his cash hoard in a 5 percent bank account. It is inconceivable that an investor would prefer to keep this in a tin box in his basement.

Furthermore, his pre-indictment year returns show an interest deduction for a car loan, yet in 1969 when the Govern-

ment contends he has unreported taxable income, he goes out and pays *cash* for a new car. As noted earlier, the jury had a right to consider this when determining whether the cash hoard existed.

Government exhibit 19 in evidence was a certificate of deposit in the amount of \$25,000 in the defendant's name dated April 17, 1967 and by its terms payable in one year. By notations on the back of that instrument it was cashed on the date of maturity, to the day, April 18, 1968. Further notations on the bank indicate that the proceeds of that account went into a gold passbook account, a special interest bearing time deposit account (184) which was called to the jury's attention (Tr. 816). It is this type of activity of Mr. Gay's investing habits which defeat his subsequent claims of a cash hoard.

All of the evidence in the case pointed to one fact, Mr. Gay was an astute investor.

All the evidence pointed to the non-existence of a cash hoard.

Mr. Gay who earned his money by putting money to work for him was not the type of man to keep over \$100,000 in a tin box in the basement.

Granted the above is jury argument. The non-existence of the cash hoard was corroborated by the Government's evidence of Mr. Gay's investments and investing habits and the Court was correct in letting the jury decide the issue.

At the June 8, 1972 interview, the defendant had stated that the most cash he would ever have on hand at any one time would be \$2,000. It should be noted that after six meetings which were had between Special Agent of the Internal Revenue Service and the defendant in which every aspect of

his finances, including savings habits, investment habits, sources of income were discussed, no mention was made by the defendant to contradict or indicate in any manner that the cash on hand figures were incorrect. Now the defense is trying to find error in the Government's relying on the defendant's own statement.

Although the defendant only said on one occasion that his cash on hand was \$2,000, it was not as casual a statement as the defense contends. He was questioned about cash on hand on more than one occasion. The phrase was also defined to him by Special Agent Kryzstof in such a way as to include a cash hoard at the time he made the statement.

On Page 36 of Appellant's brief the assertion is made that at no time was the defendant asked whether he made the expenditures during the prosecution years from a cash accumulation. This is not the case. On July 3, 1973 the defendant in the presence of his accountant and attorney was advised of the method of proof being used to investigate him. There was still no statement of a "cash hoard" to account for his expenditures. See Court exhibit 35 which is appended at the end of this brief. Also 743-746.

On page 35 of defendant's brief it is intimated that the defendant may not have wanted to tell the agents about the hoard because it is the thing a person obviously wants to keep secret for security reasons. However, after the robbery in 1969 the defendant supposedly disposed of his hoard (690) and would no longer have it around in December of 1971. Therefore when the agents interviewed him this would not be a reason to keep it a secret at that time.

The defense makes a point of the fact that Agent Russo, the Government's expert witness, used various definitions for the

term cash on hand. At the time the topic of cash on hand was inquired of the defendant, Agent Russo was not in the case. At the time Agent Kryzstof clearly defined to the defendant what was meant by cash on hand so any discrepancies that Agent Russo may have attributed to the phrase would not have any effect on the defendant's conception of cash on hand when he stated it was \$2,000.

The defense also stated on Page 37 of the brief that since the mortgages made by the defendant prior to the years of the indictment could not be traced as coming out of the bank accounts, that it is established "beyond cavail that there must have been a cash hoard during that period to account for the mortgage loans." The only thing that this establishes is that the mortgage loans were not traceable from the bank accounts. The defendant may have had income in his prior years which he did not report in his return, from which these loans were made, he may have sold stocks, bonds, disposed of other assets, received loans from third parties, received paybacks of loans made to third parties, made a withdrawal from more than one account or any number of combinations of the above. That in no way establishes that these loans came from a cash hoard.

The defense also states that since there was testimony that the defendant at times made mortgage loans to individuals in excess of \$2,000, it shows that this \$2,000 cash on hand figure was erroneous. The whole definition of cash on hand given by Special Agent Kryzstof to the defendant would not have included cash withdrawn for a special purpose such as for the purpose of making a mortgage loan to a friend.

The defense also makes the contention that there was testimony by family members as to large loan transactions to them. Special Agent Kryzstof had specifically asked the

defendant as to whether there were any loans to family members, and the defendant denied that there were.

It is significant that prior to trial the Agents had six meetings with the defendant during which they inquired as to every aspect of the defendant's finances, including cash on hand and loans to family members.

It is on these two points on which the defendant's trial testimony (and case) conflict with what he told the Agents.

It is also these two items which are incapable of independent third party verification other than testimony of close family members. These two items are incapable of independent third party verification based on the evidence. The "\$2,000 cash on hand" vs. "the cash hoard" issue was properly left to the jury based on the facts.

The defendant's claim as to having made the expenditures from a cash hoard is also greatly impeached by the evidence at trial. The evidence showed that in February of 1970 Mr. Gay purchased \$80,000 worth of federal intermediate credit bank bonds. In October 1970 Mr. Gay further purchased \$100,000 worth of municipal bonds. These bonds were purchased from the Municipal Division of Marine Midland Trust Company (Tr. 196-198). These were the only tax exempt bonds ever purchased by Mr. Gay during the indictment years. When Mr. Gay took the stand he testified that because of the robbery he decided to start spending more of his cash and so he invested them in tax exempt bonds (Page 690). Yet when he paid for those bonds over \$100,000 of the purchase price can be traced as coming out of his bank accounts (\$40,000 for the first purchase and \$65,000 for the second purchase), not out of his "tin box" as he claimed. See Page 820 for analysis. From this the jury had the right to disregard his claims of a cash hoard.

Another important factor here is it would be logical for a man who is afraid to keep cash around the house because of a robbery to at least immediately deposit that cash in a bank until such time as he could find other suitable investment for it. Here he did not do this. He piecemeal made investments in the years following the robbery. This is more indicative of a person having undeclared income coming in in bits and pieces rather than sitting on top of a cash hoard.

As to loans to family members there is also great doubt raised in the jury's mind as to their actual existence. The first such loan occurred in May of 1965 in the amount of \$15,000 to the defendant's daughter, Dorothy Hobart. Page 612. She further testified at Page 619 that she had no recollection of ever having made any repayments on this loan for the indictment years 1967 through 1971. The first loan would therefore have had no effect on the Government's expenditures computation.

The second loan was a mortgage to the defendant's daughter Lorraine Russo and her husband in the amount of \$13,000 which occurred in 1962. Page 626. Although there was a mortgage bond drawn up it was never produced at the trial nor was this mortgage ever recorded anywhere (Tr. 643). Even if this loan were believed by the jury it was paid back at the rate of \$250 every calendar quarter and accordingly would have only accounted for \$1,000 of unexplained expenditures per year (Tr. 645). A \$4,000 balance of that mortgage was paid off in 1971 (663). The defendant's son-in-law Silvio Russo testified that he is the president of South Park Electric and normally conducts all of his business by paying things by checks, except *he made all his mortgage payments to his father-in-law in cash* (Tr. 660, 661). It is also noteworthy that the defendant had loaned his son-in-law's business \$80,000 (653).

The third loan was a \$20,000 loan to Silvio Russo's father to purchase property and was supposedly made in December 1967. This loan was introduced by the testimony of Silvio Russo, the defendant's son-in-law (Page 666). However, Mr. Russo further went on to testify that although he knew that there were loan instruments drawn up to evidence this loan it had never been recorded and that subsequently Silvio Russo had destroyed that instrument (Tr. 667). Russo went on to testify that the loan was paid back in \$5,000 installments every six months (648). Again it should be noted that the cancelled checks were not available to substantiate this. Pages 668, 669.

It should be noted that even if these loans were to be believed by the jury the return payments of them are too insignificant to explain expenditures during the indictment years without the defense resulting to a cash hoard. The most significant loan is the one to Silvio Russo's father and this merely increases the defendant's unexplained expenditures by \$20,000 for the year 1967 which the Government did not have information on at the time of its calculations and decreases his expenditures for the year 1968 by \$10,000 and also by \$10,000 in 1969. Therefore the case still is decided by the cash hoard issue.⁵

⁵	1967	1968	1969	1970	1971
Expenditures In Excess of Funds Originally Computed	\$16,497	\$18,571	\$50,287	\$46,161	\$35,512
ADD:					
Loan to Silvia Russo's Father—1967	<u>20,000</u>	<u> </u>	<u> </u>	<u> </u>	<u> </u>
Total	\$36,497	\$18,571	\$50,287	\$46,161	\$35,512
LESS:					
Payback of Loans to Family					
Hobart Mortgage	-0-	-0-	-0-	-0-	-0-
Russo Mortgage	\$ 1,000	\$ 1,000	\$ 1,000	\$ 1,000	\$5,000
Russo Loan	<u> </u>	<u>10,000</u>	<u>10,000</u>	<u> </u>	<u> </u>
Adjusted Expenditures	<u>\$35,497</u>	<u>\$ 7,571</u>	<u>\$39,287</u>	<u>\$45,161</u>	<u>\$30,512</u>

The \$2,000 cash on hand figure was entered into evidence through the testimony of Special Agent Krysztof who was the very first witness to take the stand at trial. At this point in the trial, the Government had absolutely no hint or instruction that the whole case was to be decided based on the issue of cash on hand. However, it can be presumed that the defense was aware of its case and the importance of the cash on hand issue.

If this admission of cash on hand to Agent Krysztof was so fragile a basis for the Government to base its case on, the defense should have demonstrated this to the jury during cross examination. Yet instead of fully exploring the circumstances surrounding this statement, and knowing the significance of it, defense counsel almost ignores it in cross examination. Only three cursory questions were asked about this on cross examination (Tr. 89-90). Now the defense complains because it is uncorroborated after letting it into evidence without hesitation.

Finally, appellant makes the incredulous argument on Pages 37 and 38 of his brief that all of the defendant's mortgage activity should be held to be a separate source of cash available for expenditures other than the cash hoard testified about. *In effect what the appellant is saying is that he had two separate cash hoards. One general purpose cash hoard for \$110,000 and one special cash hoard for mortgage loans of \$129,000. Ridiculous!* First of all, according to his listing of mortgages it is interesting to note that of the mortgages listed in his footnote \$38,000 worth were made during the prosecution years. Of this \$20,000 was the Russo loan which actually increased his unexplained expenditures. Secondly noted in the footnote that \$91,500 of these mortgages were made prior to the indictment years but no claim is made, nor could there be (with the exception of the Russo mortgage for

\$13,000 which is noted above), that these mortgages were paid back during the indictment years which the Government missed in its calculations as a source of available cash. The repayment of these mortgages which were received by the defendant during the indictment years were allowed to the defendant as a source of funds by the Government in its direct case.

Even though the defendant's reasoning in this regard was totally erroneous it is interesting to note that the \$239,500 which he attempts to force on this Court as being the source of non-taxable funds which accounted for the excess expenditures during the entire prosecution period is very close to the opening net worth which the Government attributed to him as of December 31, 1966 in the amount \$245,000.

The defendant had argued previously that since there was cash mortgage activity prior to the indictment years that this must substantiate that cash hoard claim. Now the defendant adds up all the mortgages and attempts to add this to the \$110,000 cash hoard as being a separate amount of money. Not taking any consideration into the fact that some of the repayments of the earlier years mortgages may have gone into making the later years mortgages or the fact that the repayments of some of these mortgages may have gone into the defendant's \$247,000 opening net worth, or cost of living. The appellant in this last paragraph is merely attempting to find any figures available to total up to a figure greater than the \$170,000 unexplained expenditures which the defendant made during the indictment years. Yet can point to no pay backs of any one of these mortgages or combination thereof during the indictment years which explains the excess of expenditure.

The amount of corroborating evidence for the \$2,000 figure or lack of corroborating evidence was for the jury's deliberations, and reversal should not be granted on this ground.

POINT III

All the evidence in the case did not establish a reasonable doubt as a matter of law.

Here again, appellant pounds away at his theory that the defendant's mortgage activity in the years prior to the indictment years indicated a cash hoard. It is apparently the appellant's theory if an argument is repeated in his brief a sufficient number of times that this Court will accept it as a principle of law without citing any case law to substantiate it. Again the argument here comes down to the fact whether or not the cash hoard existed. There was evidence in front of the jury to indicate that it did not, the jury found that it did not exist and accordingly, viewing the evidence in the light most favorable to the government, that finding should not be disturbed. Again, appellant's theory is that the government should have investigated the defendant's mortgage activity prior to the indictment years, and there is no such requirement. All the government is required to do is to tie down the defendant's assets at the beginning of the period and investigate non-taxable sources. As to non-taxable sources if the leads are not forthcoming from the taxpayer the government has fulfilled its burden of proof which was done in this case.

Defendant cites *United States vs. Bethea*, 537 F.2d 1187 (4th Cir. 1976), as being directly on point with this case. In that case, the defendant was convicted under the net-worth theory of income tax evasion for the years 1971 and 1972. It was shown that the defendant's average income for the years 1967 through 1970 were \$2,850 and that in 1971, his net worth increased over \$7,500, and in 1972, it increased over \$15,000.

During the investigation, the Special Agent asked the defendant as to what inheritances or gifts he had received in

1968 through 1972, to which the defendant responded two or three thousand dollars from his brother. However, at the trial of the action the claim was that this was inaccurate and he actually received \$53,000 or \$54,000 as a result of his brother's death.

The court held that he could not be convicted on the basis of a false statement alone and found there were *objective* facts which made this story credible. The defendant's story was that his brother was a narcotics dealer in New York City and often times his brother left him sealed envelopes containing money to be put in his safe-deposit box, and told him the contents of those envelopes were his if the brother were to die.

His brother was knifed to death in July 1970, and the Court in reversing the defendant's conviction (from a non-jury trial) pointed to the following objective facts which made this story credible. Firstly, that his brother's criminal record confirmed the fact that he was in business of dealing in narcotics in that he had been arrested eight times for narcotic sales. Secondly, his brother was known to carry large amounts of money on his person. His brother's lawyer had testified that he had seen defendant's brother on occasion with envelopes containing up to \$7,500.00 in \$100 bills and his brother had commented that he could get that much more with little or no effort. Thirdly, the Court pointed to the fact that while the defendant was living at a near-poverty level prior to 1971, he had rented a safe deposit box and visited it 18 times between June 1969 and July 13, 1970, the date of his brother's death. The Court commented that why would a poor man want a safe deposit box unless it was to keep his brother's money in it. Accordingly, that case is easily distinguishable from the case before this Court. In the Joseph Gay case, there is more than just a bare admission. There is the evidence of the defendant

making his livelihood from investments, his extensive investments prior to the prosecution period, his borrowing money for the purchase of an automobile prior to the prosecution period yet paying cash during the prosecution period when it is claimed he has unreported income, and his investment habits. Also distinguishable from the *Bethea* case is the fact that here the defendant's cash hoard claim was not objectively verifiable. The whole story came from his immediate family members without any disinterested third-party documentation or verification.

Every aspect of the *Bethea* case was consistent with the defendant's cash hoard defense while in the case now before the Court, the proof as to the defendant's investments are totally inconsistent with the existence of a cash hoard.

Defendant's conviction should be affirmed on this ground.

POINT IV

Errors require a new trial

The defendant has moved the Court to exercise its discretion and order a new trial for three reasons.

The Government urged a conviction on speculation and hint by urging a conviction on the grounds that the printing business was a likely source of taxable income. The defense cites the following portion of the Government's summation in support of its argument.

"There is some trace of evidence in this case where possibly this income came from. We know he had a printing business. You could speculate that this income came from the printing business. There is a hint of testimony that the defendant may have been in partners at one time

in Gays Lounge with his brother . . . The defendant denied this and again this is just a hint, just speculation."

However, the defense again takes the quote out of context in failing to present to the Court the full text of that statement as reported in the transcript on pages 772 through 773 wherein the argument continued:

"It is not the Government's burden to prove beyond a reasonable doubt where the income came from. This is an important concept to keep in your mind."

There was nothing prejudicial in those comments in that the Government was merely explaining to the jury what its burden of proof was. That the jury shouldn't speculate as to a source of income because there was no burden of proof to show a likely source of income. Therefore, the Government was not asking the jury to convict the defendant on hint or speculation. Secondly, there was no objection made by the defense at the time these comments were made. It appears that the reason was that these comments were not objectionable as they are now made out to be. Even if they were objectionable, the defense has waived its right by failing to object during the course of the trial at the time the comments were made.

The appellant also ignores later comments in the prosecutor's summation wherein this theme is again taken up at Page 787.

Let's take a closer look at this expenditures theory of proof. As you remember, I said to you a little while ago that the Government does not have to prove the exact source of these expenditures but that the Government, if the Government doesn't prove this, they have to prove something in the alternative and that is that these expenditures did not come from a non-taxable source.

Therefore, a new trial should not be granted on this ground.

Secondly, the appellant contends that there was error in the Court's charge to the jury in that although there was testimony that there was a cash accumulation of \$110,000, the Court charged, "If there is a cash accumulation, and you believe that there is a cash accumulation, then, of course, that is not a taxable source of income for the years 1967, 1968, and 1969."

It is important to note that there was no objection made to the charge given by the Court to the jury. The Court after the charge gave the attorneys ample opportunity to make objection and specifically asked defense counsel whether there was any exception taken to the charge. Defense counsel answered, "The charge is satisfactory to the defendant, Your Honor. No requests, no exceptions." (Tr. 891).

At no time during the defendant's case did anyone testify as to seeing more than \$110,000 in the tin box. Therefore, this charge is consistent with the proof in that even a \$110,000 cash hoard would not have accounted for all the expenditures made by the defendant. In the years 1967, 1968 and 1969, the defendant's total expenditures in excess of funds total over \$85,000. This would only have resulted in the availability of \$25,000 of the \$110,000 cash hoard for expenditures in 1970 and 1971. This would not have accounted for the expenditures of over \$46,000 in excess of funds in 1970 nor the expenditures of over \$35,000 in excess of funds in 1971. So even if a \$110,000 cash hoard did exist and the defendant utilized this to make his expenditures, he would have exhausted this cash hoard without having accounted for all of the expenditures in 1970 or 1971. However, this is a moot question because the jury had found that the alleged cash hoard did not exist.

The defense also contends the charts were inaccurate and prejudicial in that as they quote from *Holland vs. United States*, 348 U.S. at 128, "... bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them." However, the Court took great pains to make sure that the jury did not attach undue significance to the charts. Prior to the charts being introduced into evidence, the Court cautioned the jury that:

"... the chart is only a guide. It is only a help. It is not independent evidence, standing by itself of the facts of this case." (Tr. 464).

The Court also reiterated this when giving its charge to the jury when it stated:

"In this case, you will recall that there are certain exhibits which are before you here, and as I have told you before, these are guides to you only. They do not have any kind of life of their own. They are only as good as the underlying testimony of the witnesses who supplied the information, and the underlying exhibits which are referred to during the testimony of the expert." (Tr. 869).

Therefore, the Court took more than adequate precautions to insure that the charts and the figures contained therein did not acquire an existence of their own independent of the evidence which gave rise to them. See also pages 776 through 780 of the Transcript where the Government in closing argument went to great length to make sure that the jury could work back from the charts to the underlying exhibits and underlying testimony and even invited the jury to do so if there was any question whatsoever as to where the figures on the charts came from.

The defense also raises as a grounds for new trial that Government Exhibit 159 was labeled in such a way to severely prejudice the defendant without a showing by the Govern-

ment of the ultimate fact which it was required to prove. This is in reference to the figure which combined the expenditures in excess of funds with the taxable income reported by the defendant and which was labeled "total taxable income." The defense states that this label was totally inappropriate and assumed the very fact that the Government was required to prove.

The Court made special provision for the defense counsel to have an opportunity to inspect these charts prior to their ever having been brought into the Court room to make sure that any objections the defense counsel had could be ironed out prior to their being viewed by the jury. The Court even stating that it would be available for the purpose of settling any problems between prosecution and defense regarding the charts. The Court specifically instructed the defense to inspect the figures ahead of time to see whether there were any mistakes or errors or any objections as to the design or wording. The Court specifically called to Mr. Murphy's attention that the wording often times is a problem in these type of cases and that any problem should be cleared up ahead of time (Tr. 458). Yet there was no objection voiced when these went into evidence (Tr. 468).

The defense's objection at this time is untimely especially in such a situation where the Court went to special pains to resolve any differences in advance of the charts being brought into the court room.

Furthermore, at the time the Government's Exhibit No. 159 was introduced into evidence, the term, total taxable income, which the defense now objects to, was the only conclusion which could be drawn from the evidence. At that point, there was no evidence that the expenditures and excess of funds was from the defendant's alleged "cash hoard."

Also the objection which the defense makes to the charts as being mathematically and technically incorrect is unfounded. The defense has misinterpreted the line wherein the Government deducts the taxable portion of the capital gains included in adjustable gross income. It is interpreted as deducting out the *tax* due in the year which the capital gain was made rather than the year which would require payment of the tax (on the following April 15th). This is not the situation in the Government's Exhibit No. 159.

What the Government is doing is allowing the defendant the total funds which he received upon the sale of a security or other capital gains transaction rather than the 50 percent which is included taxable income. In other words, what is included in the adjusted gross income is only 50 percent of the *profit* from the sale. However, when the defendant would sell a capital gain asset, he would have a source of funds of the total amount of the sale price (profit plus his cost of that asset). What is included in the adjusted gross income is only 50 percent of the profit on that asset. So in computing sources of funds, the Government takes the defendant's adjusted gross income for any particular year, adds to that the total sale price of assets sold (basis plus profit) and then deducts the taxable portion of the capital gains which had already been included in adjusted gross income.

This concept is best clarified by an example. Suppose an individual had *ordinary income* of \$10,000. In the same year he sold stock for \$10,000 for which he had paid \$5,000 originally. He would have a profit of \$5,000, and if this were a long term capital gain only \$2,500 would be taxable. The \$2,500 long term capital gain plus \$10,000 ordinary income would result in adjusted gross income of \$12,500. In determining the source of expendible funds, the total sale price of

the stock must be taken into consideration or \$10,000 as well as other taxable income. So the Government adds adjusted gross income of \$12,500 plus proceeds from the stock sales of \$10,000. Since the \$2,400 taxable profit is included in adjusted gross income and total sales price of the stock, it is added in twice, and, therefore, must be deducted out. That is the significance of the line entitled, "Less Taxable Portion of Capital Gains in Adjusted Gross Income" on Government's Exhibit 159.

Therefore, this deduction had nothing to do with the tax paid, but rather prevent the taxable portion of the sale from being included in the source of funds twice for any given year.

A new trial based on the charts should also be denied.

Conclusion

The defense uses as a foundation for its arguments under Points I, II, and III the mortgage activity of the defendant in the years prior to the prosecution years. The Government submits that the defense is trying to be repetitive so that if the Court hears the argument enough, it will believe it. That it leads to the inescapable conclusion which the defense in trying to force on the Court that the prior years mortgage activity is absolute evidence of the cash hoard. However, the cash hoard conclusion does not necessarily follow from the prior years mortgage activity as was clearly demonstrated in the Government's response to defendant's Points I, II and III.

The prior years mortgage activity is nothing more than an indication that the cash hoard *might* exist, not did exist. As the Court correctly pointed out to Mr. Murphy at the time this argument was raised at trial, it is jury argument (Tr. 765).

This prior year mortgage activity bears on a question of fact and is not elevated to a matter of law no matter how many times the defense repeats it.

It is significant to note that the defendant's Points I, II, and III revolve around the existence or non-existence of the cash hoard. This was the issue properly left with the jury.

For the reasons noted above, the Government respectfully requests that the defendant's conviction be affirmed.

RICHARD J. ARCARA,
United States Attorney,
Western District of New York,
502 United States Court House,
Buffalo, New York 14202.

Richard E. Mellenger,
Assistant United States Attorney,
Of Counsel.

A1

APPENDIX

Court Exhibit 35

BUF-CT-21-73

JDSteele

In re: Joseph J. Gay
3 Fredro Street
Buffalo, New York 14206

MEMORANDUM OF CONFERENCE

Present:

For the Taxpayer: Joseph J. Gay, Taxpayer
Ted Willis, Accountant
Crucian S. Messina, Attorney

Date: July 3, 1973

Time: 10:00 A.M. to 11:00 A.M.

Place: Office of Regional Counsel
306 U.S. Courthouse
Buffalo, New York

We first explained the purpose of the conference, the recommendations of the Intelligence Division, and the civil figures for taxable income and the revised tax liability. We then noted that any information presented would be taken into consideration but cautioned that anything said could be used against Mr. Gay in the event of trial.

Mr. Willis stated that Mr. Gay was an honest taxpayer who diligently reported all of his private mortgage interest and that if there were any tax deficiencies during these years they were due to ignorance on Mr. Gay's part. He acknowledged

Appendix—Court Exhibit 35.

that Mr. Gay failed to report interest on a Government bond but that this was because Mr. Gay did not believe that the interest was taxable. He stressed that Mr. Gay had cooperated with the agents fully and never earned the amounts attributed to him by the agents. The taxpayer's representatives, after being advised that the net worth method of proof was being used in this case, advised that the apparent increases in net worth were actually due to the expenditures of cash accumulated in prior years by retaining dividends and interest. The representatives refused to state the amount of cash-on-hand as of December 31, 1966.

Mr. Willis, a former special agent, stated that he would not handle the accounting work for a questionable client and he explained that Mr. Gay became his client when his former accountant, Francis S. Kuras, became ill. He stressed Mr. Gay's lack of education in tax matters was responsible for any deficiencies not willfulness.

At this point the conference ended and the taxpayer and his representatives were advised that we would advise them of our determination.

JOHN D. STEELE, JR.,
John D. Steele, Jr., *Attorney.*

LOUIS J. ZELLER,
Louis J. Zeller, *Attorney.*

NOTED:

STEPHEN M. MILLER,
Stephen M. Miller,
Assistant Regional Counsel.

AFFIDAVIT OF SERVICE BY MAIL

RE: U.S.A. vs Joseph J. Gay

State of New York)
County of Genesee) ss.:
City of Batavia)

No. 77-1369

I, Leslie R. Johnson being
duly sworn, say: I am over eighteen years of age
and an employee of the Batavia Times Publishing
Company, Batavia, New York.

On the 3rd day of November, 1977
I mailed copies of a printed Appellee Brief in
the above case, in a sealed, postpaid wrapper, to:

10 copies (by Air Mail) to: A. Daniel Fusaro, Clerk
U.S. Court of Appeals, Second Circuit
New Federal Court House, Foley Square
New York, New York 10007

2 copies to: Raichle, Banning, Weiss & Halpern
Att: R. William Stephens, Esq.
10 Lafayette Square
Buffalo, New York 14203

at the First Class Post Office in Batavia, New
York. The package was mailed Special Delivery at
about 4:00 P.M. on said date at the request of:

Richard J. Arcara, U.S. Attorney, Att: Richard E. Mellenger,
Assistant U.S. Attorney
502 U.S. Court House, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

3rd day of November, 19 77
Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1978